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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/525,008	09/08/2005	Reiner Kober	0690-0122PUS1	1751

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BIRCH STEWART KOLASCH & BIRCH  
PO BOX 747  
FALLS CHURCH, VA 22040-0747

EXAMINER
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HOLT, ANDRIAE M

ART UNIT	PAPER NUMBER
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1616

NOTIFICATION DATE	DELIVERY MODE
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06/11/2009

ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

mailroom@bskb.com

<b>Office Action Summary</b>	<b>Application No.</b> 10/525,008	<b>Applicant(s)</b> KOBER ET AL.	
	<b>Examiner</b> Andriae M. Holt	<b>Art Unit</b> 1616	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 09 March 2009.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-10 and 12-26 is/are pending in the application.
- 4a) Of the above claim(s) 22-26 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-10 and 12-21 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All    b) ☐ Some \*    c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                     | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

### **DETAILED ACTION**

This office action is in response to the amendment filed March 9, 2009. Claims 1-10 and 12-26 are pending in the application. Claim 1 has been amended. Claims 22-26 were withdrawn in the previous Office Action. Claims 1-10 and 12-21 will presently be examined to the extent they read on the elected subject matter of record.

The examiner clarifies that the rejection of claims 1-10 and 12-21 under 35 U.S.C. 103 (a) as being unpatentable over Scholz et al. (CA 2,338,988) in view of Valcke et al. (US 5,714,507) is the correct rejection. The examiner inadvertently included claims 22-26 on the rejection line of the Office Action Summary. Claims 22-26 remain rejected.

### **Unity of Invention Issues**

The examiner acknowledges Applicant's traversal of the Requirement based on the reasons submitted with the Response filed December 26, 2007. The examiner maintains the Unity of Invention Requirement for the reasons set forth in the Office Action filed March 20, 2008. As a result of that Requirement, claims 22-26 remain withdrawn.

### ***Status of the Claims***

Rejections not reiterated from the previous Office Action are hereby withdrawn. The following rejections are either reiterated or newly applied. They constitute the complete set of rejections presently being applied to the instant application.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

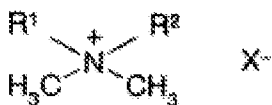
(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 1-10 and 12-21 are rejected under 35 U.S.C. 103 (a) as being unpatentable over Scholz et al. (CA 2,338,988) in view of Valcke et al. (US 5,714,507) and Rehnig et al. (US 5,968,964).

***Applicant's Invention***

Applicant claims a composition comprising a1) at least one active ingredient selected from among the pesticidally active triazole class; a2) at least one active



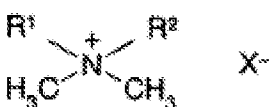
ingredient of the formula (III)

;

b) at least one straight-chain or branched saturated or unsaturated aliphatic carboxylic acid and d) water. Applicant further claims a composition further comprising component c1) alkylglycosides.

***Determination of the scope of the content of the prior art  
(MPEP 2141.01)***

Scholz et al. teach that the objective of the invention is to provide stable homogeneous active compound concentrates on an aqueous base which have a very high proportion of active compound and which contain an activity-enhancing proportion of additives (col. 4, lines 32-37). Scholz et al. teach the objective is achieved by providing aqueous, active-compound-containing compositions in the form of active compound concentrates having an active compound concentration of at least 20%(component a1 less than 35% by weight, instant invention). Scholz et al. teach the concentrates compound comprise a) at least one active compound of formula



I (component a2, mepiquat chloride, instant invention) and b1) alkylglucosides (compound c, surface active adjuvant, alkylglucosides, instant invention). Scholz et al. teach that the formulations are advantageous from an ecological point of view; since the alkylglucosides are additives which are prepared from renewable raw materials (sugars) (page 7, lines 14-17). Scholz et al. teach that the preferred compound of formula I is N,N-dimethylpiperidinium chloride, mepiquat chloride (mepiquat chloride, instant invention (page 12, lines 36-38).

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Scholz et al. teach the compositions also contain one or more of the following additives a) up to 30% of anionic, cationic or nonionic surfactants, c) up to 30% in particular up to 20%, of straight-chain or branched C3-C12-alkylcarboxylic acids, C3-C12-di- or tricarboxylic acids, such as propionic acid (component b, propionic acid, less than 70% by weight, less than 50% or less than 40% by weight, instant invention). Scholz et al. teach that the composition further contains component d) up to 40%, in particular up to 25% of other active compounds from the field of crop protection, including fungicides (page 11, lines 17-20) (a1, active ingredient up to 40%). Scholz et al. further teach the concentration of the active compound is 5-40% in the finished formulation (page 12, lines 32-34). Scholz et al. teach that the compositions contain 20-40% water based on the total weight of the formulation (component d, water, more than 10% of the composition, instant invention).

***Ascertainment of the difference between the prior art and the claims  
(MPEP 2141.02)***

Scholz et al. do not teach the active ingredient is among the pesticidally active triazole class, particularly metconazole, or the molar ratio of component (b) to component (a1) is greater than 4. It is for this reason Rehnig et al. is joined.

Valcke et al. teach synergistic fungicidal compositions containing a fungicidal triazole and metconazole for treating plants or the loci of plants (Abstract). Valcke et al. teach that the active ingredients (I) and (II) may be present in base or in salt form, the latter being obtained by reaction of the base form with an appropriate acid. Valcke et al.

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teach appropriate acids comprise, for example, inorganic acids, or organic acids, such as acetic and propionic acid. Valcke et al. teach the salts are generally most suitable for preparing compositions for use as agrochemicals. Valcke et al. teach the synergistic mixtures according to the present invention are most useful to combat fungi or prevent the growth thereof in plants or the loci.

Rehnig et al. teach a liquid fungicidal composition comprising (a) a fungicidally acceptable carrier comprising a mixture of 1-pentanol and 2-methylbutanol, wherein the ratio (by weight) of the 1-pentanol to 2-methylbutanol is from 1:1 to 1:10; (b) at least one compound of formula; (c) a solubilizing agent; and (d) optionally other formulation adjuvants (Abstract). Rehnig et al. teach that preferred metconazole (pesticidally active triazole, metaconazole) is the preferred azole (col. 2, lines 1-36). Rehnig et al. teach the compound of formula I is capable of forming salts or addition products with inorganic or organic acids or metal ions. Rehnig et al. teach suitable organic acids are formic acid and alkanolic acids such as acetic acid, trifluoroacetic acid, trichloroacetic acid and propionic acid (carboxylic acid, propionic acid), and additionally glycolic acid, lactic acid, succinic acid, citric acid, and benzoic acid. Rehnig et al. teach the compositions are used to control phytopathogenic fungi which comprise the application of the liquid formulation of the invention or a spray mix obtained from the liquid formulation.

***Finding of prima facie obviousness  
Rationale and Motivation (MPEP 2142-2143)***

It would have been obvious to one of ordinary skill in the art to combine the teachings of Scholz et al., Valcke et al., and Rehnig et al. and use a pesticidally active

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triazole compound, particularly metconazole, in the formulations. It would have been obvious to the skilled artisan to add a triazole compound, such as metconazole, since it is an effective fungicide that combats fungi as evidenced by the teachings of Valcke et al. and Rehnig et al. In addition, Valcke et al. and Rehnig et al. teach that salt forms of metconazole compounds are useful as agrochemicals.

Scholz et al. teach the formation of stable homogeneous active compound concentrates on an aqueous base which have a very high proportion of active compound and which contain an activity-enhancing proportion of additives, including mepiquat chloride, propionic acid, and alkylglucosides. As such, one skilled in the art at the time the invention was made would have been motivated to use a fungicide as the active agent because Scholz et al. teach that active compounds including fungicides can be added to the compositions. Therefore, the claimed invention as a whole would have been prima facie obvious to one of ordinary skill in the art at the time the invention was made because every element of the invention has been fairly suggested by the cited reference.

### ***Response to Arguments***

Applicant's arguments filed March 9, 2009 have been fully considered but they are not persuasive. Applicant argues that Scholz et al. fail to disclose or suggest the use of active ingredients from the triazole class and that Scholz et al. fail to address the problems encountered in formulating stable, homogenous and aqueous-based compositions which additionally include high amounts of triazoles.



In response to applicant's arguments, Scholz et al. teach that all of the components of Applicant's composition may be combined in a formulation to form stable homogeneous active compound concentrates on an aqueous base which have a very high proportion of active compound and which contain an activity-enhancing proportion of additives. While Scholz et al. do not specifically teach the use of triazole compounds as the active agents, the reference does teach that fungicides can be used in the compositions. It is for this reason Valcke et al. and Rehnig et al. were joined as secondary references. Therefore, it would have been obvious to the skilled artisan to add a triazole compound, such as metconazole, since it is an effective fungicide that combats fungi as evidenced by the teachings of Valcke et al. and Rehnig et al. In addition, Valcke et al. and Rehnig et al. teach that salt forms of metconazole compounds are useful as agrochemicals.

None of the claims are allowed.

### ***Conclusion***

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the

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shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Andriae M. Holt whose telephone number is 571-272-9328. The examiner can normally be reached on 9:00 am-5:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Johann Richter can be reached on 571-272-0646. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Andriae M. Holt  
Patent Examiner  
Art Unit 1616

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/Johann R. Richter/

Supervisory Patent Examiner, Art Unit 1616